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No. 9244

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC FREIGHTERS COMPANY (a corporation),
Appellant,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Appellee.

BRIEF FOR APPELLANT.

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Pacific Freighters Company (a corporation),
Appellant,
vs.
St. Paul Fire and Marine Insurance Company,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT AS TO JURISDICTION.

This is a suit in admiralty, brought by appellee, as assignee of the owner of cargo shipped on the Schooner "Rosamond," against appellant, the owner of the vessel, to recover $7,224.72 claimed to be due from the vessel to the cargo as general average (Ap. 2-7). Appellant answered, denying that any amount was due the cargo (Ap. 8-16), and filed a cross-libel to recover $4,694.22 due from the cargo to the vessel as general average (Ap. 16-21). The parties stipulated for the submission of the cause to the court on a question of law (Ap. 70-73). The court made an interlocutory decree in favor of appellee and referred the cause to a commissioner (Ap. 99-100). After the reference, the court entered a final decree in favor of

appellee for $7,119.18 (Ap. 109-111). Appellant filed timely petition for an appeal (Ap. 112); the appeal was allowed (Ap. 112-113) and was duly perfected (Ap. 113-135).

The district court had jurisdiction under section 24(3) of the Judicial Code (U.S.C. 28:41). This court has jurisdiction under section 128(a), First, of the Judicial Code (U.S.C. 28:225).

The pleadings necessary to show the jurisdictions are the libel (Ap. 2-7), the answer to the libel (Ap. 8-16), the cross-libel (Ap. 16-25), and the answer to the cross-libel (Ap. 30-37).

STATEMENT OF THE CASE.

Appellant, the owner of the Schooner "Rosamond,"[1] chartered her to Comyn, Mackall & Co.[2] The charter was in the usual form of a voyage charter and provided for the carriage of a full cargo of lumber from the North Pacific Coast to South Africa, freight to be considered earned, vessel or cargo lost at any stage of the voyage,[3] and general average, if any, to be payable under the York-Antwerp Rules of 1890.[4]

Rule I of the York-Antwerp Rules of 1890 provides:[5]

> "No jettison of deck cargo shall be made good as general average."

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1. Libel, Art. II, Ap. 3; Answer, Art. I, Ap. 8.
2. Stipulation, Ex. "A," Ap. 74.
3. Stipulation, Ex. "A," marginal note, Ap. 74.
4. Stipulation, Ex. "A," Clause P, Ap. 74.
5. Lowndes, General Average, 6th ed., p. 811.

The charterer shipped the cargo of lumber, including a deck cargo,[6] paid the freight,[7] and took bills of lading[8] which provided for average under the York-Antwerp Rules of 1890, and for the application of the other conditions and exceptions of the charter party.[9] The charterer sold the cargo to Smith, Kirkpatrick & Co.,[10] appellee's assignor.[11]

The "Rosamond" sailed on her voyage, met a storm, jettisoned her deck cargo and put into San Francisco as a port of refuge, where she discharged the underdeck cargo, repaired, reloaded the underdeck cargo, and took on a new deck cargo.[12]

Thereafter she proceeded to South Africa and delivered her entire cargo.[13] Prior to taking delivery, the consignee of the underdeck cargo signed the usual general average agreement, providing that losses and expenses should be paid unto Geo. E. Billings Co., as trustees for all concerned, that such losses and expenses should be stated and apportioned, and that payment should be made upon the completion of the statement.[14]

Appellee assumed responsibility for any general average contribution due from the underdeck cargo.[15]

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6. Libel, Art. IV, Ap. 3; Answer, Art. II, Ap. 9; Stipulation, Ap. 70.
7. Stipulation, Ap. 70.
8. Stipulation, Ex. "B," Ap. 75-76.
9. Ap. 76.
10. Libel, Art. IV, Ap. 3; Answer, Art. II, Ap. 9.
11. Libel, Art. XIV, Ap. 6.
12. Libel, Art. V, Ap. 3-4; Answer, Art. III, Ap. 9.
13. Libel, Art. VII, Ap. 4-5; Answer, Art. V, Ap. 10.
14. Stipulation, Ex. "C," Ap. 71, 77-78.
15. Stipulation, Ap. 72.

Pursuant to the foregoing agreement, Geo. E. Billings Co. made the general average adjustment.[16] This adjustment excluded from the general average computation the new freight received for the replacement deck cargo, and the amounts which were spent in earning it. It found the total general average expense to be $8,317.62,[17] and apportioned this, $3,623.40 to the vessel and $4,694.22 to the underdeck cargo, on the basis of their respective contributory values, $47,596 and $61,662.[18]

Appellee refused to pay the contributory share of the cargo; instead, it filed the libel herein, alleging that the new freight should have been included in the general average computation, and that the underdeck cargo was entitled to participate in the new freight in proportion to its contributory value.[19] Appellant answered, denying that any contribution in general average should be paid by the vessel to the cargo on account of the new freight,[20] and filed a cross-libel to recover the contribution of $4,694.22 owed by the cargo under the general average adjustment.[21]

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16. Stipulation, Ex. "D," Ap. 71, 80-99.

Two copies of the Statement of General Average were transmitted to this court by the court below as original exhibits (Ap. 124-125). Pursuant to the order of this court of July 31, 1939 (Ap. 134), these exhibits are part of the record on the appeal. Portions of the Statement of General Average are printed on pages 80-99 of the Apostles on Appeal.

17. Ap. 97.
18. Ap. 98.
19. Ap. 2-7; Art. VIII, Ap. 5.
20. Ap. 8-16.
21. Ap. 16-25.

The parties stipulated for the submission of the cause to the court on the following question of law:[22]

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned."

The court filed an interlocutory decree, finding that the question should be answered in the affirmative and referring the cause to a commissioner to ascertain and report the gross amount of the new freight, to deduct therefrom the total amount of general average expense, and to prorate the balance between appellee and appellant in proportion as the contributory value of the vessel and cargo each bears to the whole contributory value.[23]

The commissioner, after a hearing, found the gross amount of new freight to be $21,191.15, and, after deducting the amount of general average expense ($8,317.62), apportioned the balance, $5,674.35 to appellant as the owner of the vessel, and $7,199.18 to appellee as owner of the underdeck cargo. Thereafter, the court overruled appellant's exceptions to the commissioner's report and made and entered its final decree, based upon its interlocutory decree and the report of the commissioner, that appellee recover from appellant $7,199.18.[24]

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22. Ap. 70-73.
23. Ap. 99-100. A report of the interlocutory decree appears in 1929 A.M.C. 107.
24. Ap. 109-111.

This appeal followed.

The district court rendered no opinion, either on interlocutory or final decree.

THE QUESTIONS INVOLVED.

The first question is that submitted to the district court by the stipulation:[25]

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned?"

The affirmative answer to this question by the lower court is the basis both for the interlocutory decree and the final decree. Appellant's criticism of that answer is the foundation for its assignments of error I, II, III, IV, V, VI, VII, X, XI, XII and XIII, directed at those decrees and raising this question.

The second question is a subsidiary one and is based upon the assumption that the first question was decided correctly by the district court:

> "Is the amount to be prorated the gross new freight or the net new freight, that is, the gross new freight after deducting expenses incurred in earning it?"

While the stipulation did not submit this question expressly to the district court, nevertheless, that court, in

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25. Ap. 70-73, 71.

its interlocutory decree, went beyond the stipulation and decided expressly that the gross new freight was to be prorated (Ap. 100). The commissioner complied with this ruling (Ap. 105-107), and the final decree confirmed it (Ap. 110-111). Assignment of error IX is directed at this action and raises the question; see also assignments of error X, XI, XII and XIII.

SPECIFICATION OF ERRORS.

The following assigned errors are to be relied upon: assignments of error I, II, III, IV, V, VI, VII, IX, X, XI, XII and XIII (Ap. 113-118).

SUMMARY OF ARGUMENT.

First. The new freight should not be prorated between the vessel and her cargo in general average.

General average relates to *contribution* in order to make good *loss, damage or expense.*

Star of Hope, 9 Wall. 203, 228.

In the instant case, the district court ordered the *distribution* of moneys *received.* There is no shadow of authority for such a course. It is contrary to the principle of general average.

The new freight was not earned by any general average act. The opportunity to earn it arose from the jettison of the deck cargo which was not to be made good in general average (Rule I, York-Antwerp Rules, 1890). It was earned by the vessel which appellant owned and the crew which appellant paid.

Second. In any event, the only thing to be considered should be the net freight, not the gross freight.

Whenever freight comes into a general average adjustment, what is considered is not the gross freight, but the net freight, that is, the gross freight less subsequent expenses incurred to earn it.

Rule XIV, Rules of Practice of the Association of Average Adjusters of the United States, Lowndes, General Average, 6th ed., p. 853;

The Brigella (1893) Probate Div. 189, 196.

Obviously, the only possible benefit to the venture in the instant case was the amount of freight in excess of the expenses incurred to earn it.

The principle of general average is an equitable doctrine.

Milburn & Co. v. Jamaica Fruit Importing and Trading Company of London, 2 Q.B. (1900) 540, 550;

Barnard, et al. v. Adams, et al. (1850) 10 How. 270, 303.

Apportionment of the gross freight would be highly inequitable.

ARGUMENT.

1. THE NEW FREIGHT SHOULD NOT BE PRORATED BETWEEN THE VESSEL AND HER CARGO IN GENERAL AVERAGE.

Assignments of Error.

I.

The district court erred in finding and decreeing in its interlocutory decree, dated July 19, 1928, that the ques-

tion of law propounded in the stipulation for submission of cause herein, to wit,

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned."

should be answered in the affirmative.

II.

The district court erred in rendering and entering its final decree herein dated March 28, 1939, on the basis of its finding in its interlocutory decree herein dated July 19, 1928, that the question of law propounded in the stipulation for submission of cause, to wit,

> "Is the said vessel and her said remaining original cargo entitled to be credited pro rata for such extra freight received by said vessel and her owners at the port of distress as the result of the substitution of the new cargo for that portion of the cargo which had been jettisoned."

should be answered in the affirmative.

III.

The district court erred in failing and refusing to hold and decree that respondent and cross-libelant, as owner of the Schooner "Rosamond," is entitled to retain the entire amount of freight received by said vessel for the new deck cargo loaded at the port of distress.

IV.

The district court erred in failing and refusing to hold and decree that libelant and cross-respondent is not entitled to any part of the freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress.

V.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" and her owners for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value.

VI.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value, said decree being erroneous for the reason that respondent and cross-libelant, as owner of said vessel, is entitled to retain the entire amount of said freight.

VII.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond"

for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value, said decree being erroneous for the reason that it is contrary to the charter party (Exhibit "A" to the Stipulation for Submission of Cause herein) and the bills of lading (Exhibit "B" to the Stipulation for Submission of Cause herein) governing the shipment involved herein.

X.

The district court erred in rendering and entering the final decree herein dated March 28, 1939.

XI.

The district court erred in rendering the interlocutory decree herein dated July 19, 1928.

XII.

The district court erred in not dismissing the libel herein with costs as prayed in the answer of respondent and cross-libelant and in not granting to respondent and cross-libelant a decree of dismissal with its costs herein, as prayed.

XIII.

The district court erred in not decreeing to respondent and cross-libelant the payment of the general average contribution of $4,674.22 with interest and costs, as prayed in the cross-libel herein.

This is the first case in which this question has been presented to a court. This may be due not only to the fact that no one has had the temerity in similar instances to advance the theory urged by appellee, but also because of the comparative rarity of the concurrence of the particular circumstances out of which the occasion arose. These were:

The charter party embodied the York-Antwerp Rules of 1890 (Clause P, Ap. 74). The first of these rules provides that no jettison of deck cargo shall be made good as general average. The charter provided for prepayment of the freight "same to [be] considered earned vessel or cargo lost at any stage of the entire transit" (marginal clause, Ap. 74). Deck cargo was jettisoned.

Under the first York-Antwerp Rule the jettison was not to be made good in general average. Under the marginal clause, appellant was entitled to keep the freight on the first deck cargo. The jettison left the deck vacant and open to another cargo.

If the foregoing provisions had not been in the charter party, the situation would have been quite different. Probably the customs of the trade were such that the jettison of the deck cargo would have been made good in general average. Since the old freight would have been at risk, the vessel owner would have had a claim for that in general average, but that claim would have been reduced by the net amount of the new freight.[26] By no possibility, however, could there have been any distribution of

26. Baily, General Average, 2d ed., p. 134;
Lowndes, General Average, 6th ed., pp. 348, 783.

the new freight between the vessel and the cargo such as appellee seeks in this case.

General average relates to *contribution* in order to make good *loss, damage* or *expense.* Such is the language of the definition adopted by the Supreme Court (*Star of Hope,* 9 Wall. 203, 228). Such is the consistent language of the authorities, e. g., Lowndes, General Average, 6th ed., pp. 1, 3, 7, 9, and *passim* throughout the work. "Average" (French, *avarie,* Spanish, Portuguese and Italian, *avaria,* Dutch, *haverij,* German, *havarie*) in its maritime usage is (1) a tax (2) any charge or expense, (3) expense or loss (Oxford Dictionary). General average is simply that loss, damage or expense which must be apportioned among the contributing interests. The literature of the subject is barren of any suggestion that a receipt, gain or profit is to be distributed. That, however, is just what the district court ordered here. The untenable result of the district court's ruling is that the underdeck cargo, instead of making a general average contribution to the port of refuge expenses incurred for the preservation of ship and cargo, receives, as a result of the disaster, a gift or profit of more than $7,000.

We find only two instances in which the facts were such as to give rise to a claim—like that of appellee's in the case at bar—that a *profit* should be distributed. In each instance the claim was rejected and the adjustment made without such distribution.

In *Fletcher v. Alexander* (1868), L. R., 3 C. P. 375, half freight had been absolutely prepaid. The cargo was jettisoned. The shipowner took on a new cargo, receiving full

freight for it. In general average, the adjuster allowed the shipper's claim which included the half freight he had paid, but did not require the distribution in general average of any of the new freight received by the ship-owner. While the adjustment was questioned in other respects, no question was presented to the court regarding the treatment of the freight. The net result was that the shipowner was left with his freight paid one and one-half times. Lowndes, General Average, 6th Edition, p. 109, remarks:

> "Here was a case in which the shipowner's gain of freight could not be brought in, in diminution of the merchant's loss."

In *The Pinar del Rio,* certain questions were submitted to J. Parker Kirlin, Esq. They arose out of the following state of facts:[27]

> "This vessel, bound from New York to Havana, recently stranded on the coast of Florida, was floated with assistance of salvors, after discharging part of her cargo, which was taken to Miami. Under surveyors' recommendation temporary repairs were made to the vessel lying at anchor off the Coast of Florida; she then proceeded to New York, convoyed by wrecking steamer, and after discharging remainder of her cargo here she was placed in dry dock and is now undergoing repairs of damages sustained by the stranding which, under contract, are to be completed within 25 days.
>
> The vessel, on account of insufficient depth of water at Miami, cannot go to that port for the cargo left

27. The quotation is from Mr. Kirlin's opinion.

there and another vessel has been engaged to transship it to Havana.

Part of the cargo brought to New York in the vessel is in damaged condition and its sale here will, it is expected, be recommended by surveyors. The sound portion (which is non-perishable) is equal to say one-third in bulk of the whole cargo.

The freight on the entire cargo was prepaid on terms indicated in form of bill of lading enclosed.''

The question relevant to our discussion was:

''5. When the ship is repaired she will have room available for shipment of new cargo in lieu of that sold or transshipped. How could the net freight received on the new cargo be dealt with in the average statement?''

In an opinion, dated November 19, 1912, Mr. Kirlin made the following answer to this question so far as it relates to new cargo taken in place of the old cargo jettisoned:

''*a. Cargo jettisoned.* I do not think that freight on new cargo shipped to replace cargo jettisoned should be credited to general average. The bill of lading provided that 'freight prepaid shall not be returned, goods or vessel lost or not lost.' The cargo thrown overboard was lost in the sense of this provision. Prepaid freight on such cargo was, therefore, earned. The ship owed no further obligation in respect of it. If, therefore, the charterer ships other cargo in place of the cargo jettisoned, I think he is entitled to keep the freight that may be earned on such new cargo and give no account of it to general average.''

The opinion of the experts who prepared the average adjustment in the case at bar is in accord with the above view.

In the instant case, the new freight was not earned by any general average act. Under the first York-Antwerp Rule of 1890, the jettison of the deck cargo was not to be made good in general average. So far as the general average adjustment was concerned, the situation when the "Rosamond" got to San Francisco was precisely as if she had sailed from the North Pacific Coast with her deck vacant. In such a case, the new freight would not figure in general average.

> Lowndes, General Average, 6th ed., p. 348;
> Baily, General Average, 2d ed., p. 134.

Appellant owned the "Rosamond" and hired and paid her crew. As owner of the vessel it spent more than $30,000 to refit her to carry the new cargo from San Francisco to Capetown (Ap. 97). The new freight was earned by the use of the "Rosamond" and the services of the crew. It must belong to appellant.

2. IN ANY EVENT, THE ONLY THING TO BE CONSIDERED SHOULD BE THE NET FREIGHT, NOT THE GROSS FREIGHT.

ASSIGNMENTS OF ERROR.

V.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" and her owners for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of

the vessel and the cargo each bears to the whole contributory value.

IX.

The district court erred in decreeing that the gross amount of freight received by the Schooner "Rosamond" for the new deck cargo loaded at the port of distress should be prorated, after deduction of general average expenses, between the vessel and her remaining original cargo in proportion as the contributory value of the vessel and the cargo each bears to the whole contributory value, said decree being erroneous for the reason that even if libelant and cross-respondent is entitled to a share of the freight received by said vessel for said cargo, it is entitled to a pro rata share only of the net freight.

X.

The district court erred in rendering and entering the final decree herein dated March 28, 1939.

XI.

The district court erred in rendering the interlocutory decree herein dated July 19, 1928.

XII.

The district court erred in not dismissing the libel herein with costs as prayed in the answer of respondent and cross-libelant and in not granting to respondent and cross-libelant a decree of dismissal with its costs herein, as prayed.

XIII.

The district court erred in not decreeing to respondent and cross-libelant the payment of the general average con-

tribution of $4,674.22 with interest and costs, as prayed in the cross-libel herein.

Whenever freight comes into the general average adjustment, what is considered is the net freight, that is, the gross freight less subsequent expenses incurred to earn it. Thus, where freight is at risk and is sacrificed by a jettison, the vessel owner has a claim "for the net freight lost, to be ascertained by deducting from the gross freight sacrificed the expenses in respect of same that would have been incurred, subsequent to the sacrifice, to earn it * * *."

Rule XIV, Rules of Practice of the Association of Average Adjusters of the United States, Lowndes, General Average, 6th ed., p. 853; see also Rule IV, p. 850;

Congdon, General Average, pp. 151-152.

When a new freight is substituted and is allowed as a credit against a claim for freight sacrificed, the amount credited is the net new freight, deducting the expenses.

Baily, General Average, 2d ed., p. 134;

Lowndes, General Average, 6th ed., p. 783 (Appendix Z, Coe's Treatise on the Law and Practice of the United States).

Where freight at risk has not been sacrificed and must contribute to the general average, its contributory value is taken at the net freight, that is, the gross freight less future expenses.

Rule XIV, Rules of Practice of the Association of Average Adjusters of the United States, Lowndes, General Average, 6th ed., p. 853;

Baily, General Average, 2d ed., pp. 156-157;
Congdon, General Average, pp. 157-158;
Arnould, Marine Insurance and Average, 11th ed., Vol. II, pp. 1282-1283;
Rule XVII, York-Antwerp Rules, 1890, Lowndes, General Average, 6th ed., pp. 816-817;
The Brigella (1893) Probate Division, 189, 196;
Rathbone v. Fowler (S.D. N.Y., 1869) 6 Blatchf. 294, 20 Fed. Cas. 316, 317 (affirmed, 12 Wall. 102);
Humphreys v. Union Ins. Co. (D. Mass., 1824) 3 Mason, 429, 12 Fed. Cas. 876, 879.

The allowance of gross freight in the case at bar is not only in conflict with the foregoing principles and authorities, but is also obviously unsound. The only possible benefit to the venture was the amount of freight in excess of the expenses incurred to earn it.

The doctrine of general average is equitable in its nature.

Milburn & Co. v. Jamaica Fruit Importing and Trading Company of London, 2 Q.B. (1900) 540, 550;
Barnard, et al. v. Adams, et al. (1850) 10 How. 270, 303;
Frederick H. Leggett & Co. v. 500 Cases of Tomatoes (2d C.C.A., 1926) 15 F.(2d) 270;
The Lewis H. Goward (S.D. N.Y., 1924) 34 F.(2d) 791, 793;
The Roanoke (7th C.C.A., 1893) 59 Fed. 161, 163.

"* * * courts of admiralty, when carrying into execution maritime contracts and liens * * * deal with them upon equitable principles * * *."

Bags of Linseed, 1 Black 108, 114.

Nothing could be more inequitable than the decision of the court below holding appellant accountable for the whole freight and allowing it nothing for the expense of earning it. The cargo—which contributed nothing to the earning of the freight—receives its share as a clear profit, while the vessel—by which the freight was earned—is left to pay from her share (if sufficient) *all* of the expenses incurred in earning both shares. Such a result is without support in reason or authority.

CONCLUSION.

We respectfully submit that the decree of the district court should be reversed with directions to enter a decree in favor of appellant for $4,694.22 with interest and costs.

Dated, San Francisco,
September 25, 1939.

Respectfully submitted,
Felix T. Smith,
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Pillsbury, Madison & Sutro,
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